

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 PARENT DOE and JOHN DOE,

5 Plaintiffs,

6 v.

7 CLARK COUNTY SCHOOL DISTRICT, *et*  
8 *al.*,

9 Defendants.

Case No. 2:15-cv-00793-APG-GWF

**ORDER (1) GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS; (2) DENYING MOTION TO  
DISMISS AND GRANTING MOTION  
TO PROCEED ANONYMOUSLY; (3)  
GRANTING MOTION TO AMEND; (4)  
GRANTING MOTION TO FILE SUR-  
REPLY; AND (5) DENYING AS MOOT  
MOTION FOR HEARING**

(ECF Nos. 15, 16, 21, 35, 41, 72)

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13 Plaintiffs Parent and John Doe filed this lawsuit against defendants Clark County School  
14 District (“District”), Foothill High School, Clark County School District Police (“District  
15 Police”), Erin Wing, and Jeanne Donadio. The Does assert that John Doe’s English teacher had a  
16 history of flirting with minor male students, that the District knew of this history when it hired  
17 her, and that the District did nothing to train or supervise her. According to the complaint, the  
18 teacher engaged in an improper sexual relationship with John Doe beginning in his freshman  
19 year, which culminated in the teacher pleading guilty in March 2014 to a felony conviction of  
20 luring children or mentally ill persons with the intent to engage in sexual conduct.

21 The Does assert several claims arising out of these events, including claims under 42  
22 U.S.C. § 1983, Title IX, and the Americans with Disabilities Act. The Does also allege state law  
23 claims for negligence, intentional infliction of emotional distress, public disclosure of private  
24 facts, violation of the vulnerable persons statute, and negligent infliction of emotional distress.

25 The defendants move to dismiss on various grounds. The parties also dispute whether the  
26 Does may proceed anonymously. Additionally, the Does move to amend to add additional facts  
27 regarding the teacher’s conduct.  
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1 I grant in part the defendants' motion to dismiss based on failure to state a claim, but I  
2 also grant the Does leave to amend. I deny the motion to dismiss based on the Does proceeding  
3 anonymously and I grant the Does' motion to proceed anonymously.

#### 4 **I. BACKGROUND**

5 At the time of the events alleged in the complaint, John Doe was a minor and a student at  
6 Foothill High School. ECF No. 7 at 1. John was an excellent student but suffers from anxiety  
7 attacks and depression, and he was under psychiatric care and medication. *Id.* at 3. Based on his  
8 disability, he applied for, and the District granted, a Section 504<sup>1</sup> evaluation summary and  
9 accommodation plan to begin in November 2012. *Id.* According to the 504 plan, John was to be  
10 given extra time to make up homework, tests, or quizzes when necessary; class notes when  
11 requested; and free use of an emergency pass to the nurse when needed. *Id.*

12 According to the amended complaint, John's freshman English teacher ("Teacher") had a  
13 previous history or reputation for flirting with minor male students. *Id.* The District allegedly was  
14 aware of this reputation or history but nevertheless hired her and then failed to train and supervise  
15 her. *Id.*

16 The Teacher and John had an improper relationship that began during his freshman year.  
17 *Id.* at 3-4. During this relationship, John continually missed his sixth period class to spend time  
18 with the Teacher on high school grounds. *Id.* at 4. The high school administration knew of and  
19 logged John's absences from class. *Id.* The amended complaint alleges that the school's and the  
20 District's administrators knew about the Teacher's "inappropriate flirtatious and grooming  
21 behavior, and conduct with John" prior to May 8, 2013. *Id.*

22 On May 8, 2013, the Teacher "lured" John into "sexual conduct," for which she later  
23 pleaded guilty to a felony of luring children or mentally ill persons with the intent to engage in  
24 sexual conduct. *Id.* at 3. The District Police learned of the incident the next day. *Id.* at 4. The  
25 District Police retrieved John from class and took him to the school's office where they  
26 questioned him about his relationship with the Teacher. *Id.* The office had windows and the door

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28 <sup>1</sup> Section 504 of the Rehabilitation Act, 29 U.S.C. § 749.

1 was left open so other students were able to see John being questioned. *Id.* When the Teacher's  
2 arrest was later reported in the news, "students put two and two together" and realized John was  
3 the student with whom the Teacher had a relationship. *Id.* at 4-5.

4 According to the amended complaint, defendant Jeanne Donadio, Foothill High School  
5 principal, failed to implement John's 504 plan. *Id.* at 5. The Does also allege that after the  
6 incident, John's teachers were hostile towards him and refused to accommodate his disability or  
7 implement his 504 plan. *Id.*

8 Defendant Erin Wing, John's tenth grade English teacher, was friends with the Teacher  
9 and knew about John's relationship with her. *Id.* In January 2014, Wing allegedly told John that  
10 she previously had been raped and understood his anxiety, and she told him that John had put her  
11 friend, the Teacher, out of a job. *Id.* Wing also allegedly told the English class that John hides  
12 behind his emotions with humor. *Id.* at 6. Donadio later defended Wing's comments and claimed  
13 that John misunderstood Wing due to his "unstable mindset." *Id.*

14 John attempted suicide in February 2014. *Id.* at 7. He was unable to continue his  
15 education at Foothill, and instead he finished tenth grade in after-hours instruction at Coronado  
16 High School. *Id.* John now attends a private boarding school out of state. *Id.*

## 17 **II. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

18 In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken  
19 as true and construed in a light most favorable to the non-moving party." *Wylar Summit P'ship v.*  
20 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not necessarily  
21 assume the truth of legal conclusions merely because they are cast in the form of factual  
22 allegations in the plaintiff's complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-  
23 55 (9th Cir. 1994). A plaintiff must make sufficient factual allegations to establish a plausible  
24 entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Such allegations  
25 must amount to "more than labels and conclusions, [or] a formulaic recitation of the elements of a  
26 cause of action." *Id.* at 555.

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1           **A. Official Capacity Claims, Foothill High School, and District Police**

2           The defendants move to dismiss the official capacity claims against Donadio and Wing as  
3           duplicative of the claims against the District. They also argue that Foothill High School and the  
4           District Police are not separate entities that can be sued in their own names and therefore they  
5           should be dismissed from the case. The Does do not respond to these arguments. I therefore  
6           grant this portion of the defendants' motion as unopposed. LR 7-2(d); *see also Ctr. for Bio-*  
7           *Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 799 (9th Cir. 2008) ("An  
8           official capacity suit against a municipal officer is equivalent to a suit against the entity.").

9           **B. Section 1983 Claim Against Wing, Donadio, and the District**

10          The Does' § 1983 claim contains allegations against Wing, Donadio, and the District. The  
11          Does allege Wing and Donadio deprived John "of his rights under color of state law in handling  
12          his disability and educational needs after the May 8, 2013 Incident and by participating in and/or  
13          fostering a continuation of the effects of the abuse." *Id.* at 7. The Does also allege Wing and  
14          Donadio were deliberately indifferent to John's disability and his educational and constitutional  
15          rights by ignoring and refusing to implement his 504 plan. *Id.* at 7-8.

16          As to the District, the amended complaint alleges the District has a policy, custom, or  
17          practice of ignoring the implementation of 504 plans. *Id.* The Does also allege the District knew  
18          about and was deliberately indifferent to the Teacher's propensities to flirt with minor male  
19          students and failed to train and supervise her. *Id.* at 8. Next they allege the District had a policy,  
20          custom, or practice of removing students from class and interrogating them in publicly visible  
21          rooms with deliberate indifference to the student's privacy. *Id.* at 9. Finally, they allege the  
22          District has a policy, custom, and practice of failing to properly hire, train, and supervise its  
23          employees to prevent sexual misconduct between teachers and students. *Id.*

24          "To state a claim under § 1983, the plaintiff must allege a violation of his constitutional  
25          rights and show that the defendant's actions were taken under color of state law." *Gritchen v.*  
26          *Collier*, 254 F.3d 807, 812 (9th Cir. 2001). The parties do not dispute that Wing, Donadio, and  
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1 the District acted under color of state law. Thus, the only question is whether the Does  
2 adequately have alleged a violation of John's constitutional rights.

3 *1. Defendant Wing*

4 Wing argues this claim is vague as to the constitutional rights at issue, but she assumes the  
5 constitutional basis is substantive due process. Wing argues she is not alleged to have engaged in  
6 any inappropriate sexual conduct with John and the few comments she allegedly made do not rise  
7 to the level of a due process violation. Alternatively, she asserts she is entitled to qualified  
8 immunity. The Does respond that Wing's comments shock the conscience and deprived John of  
9 his constitutional right to be free from emotional and psychological injury by a government actor.

10 "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional  
11 sense" sufficient to support a substantive due process claim. *Cnty. of Sacramento v. Lewis*, 523  
12 U.S. 833, 846 (1998) (quotation omitted). Substantive due process "does not entail a body of  
13 constitutional law imposing liability whenever someone cloaked with state authority causes  
14 harm." *Id.* at 848. Rather, the official conduct must "shock[] the conscience." *Id.* at 846.

15 John "had a constitutional right to be free from state-imposed violations of bodily  
16 integrity," including freedom from sexual abuse by a school teacher at a public school. *Plumeau*  
17 *v. Sch. Dist. No. 40 Cnty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). However, Wing is not  
18 alleged to have sexually abused John or to have touched him in any way. Instead, she is alleged  
19 to have made a few isolated comments to him. Her alleged statements that she was raped so she  
20 understood his anxiety, that he had cost her friend a job, and that John hides his emotions behind  
21 humor do not rise to the level of a substantive due process violation. *See Costello v. Mitchell Pub.*  
22 *Sch. Dist.* 79, 266 F.3d 916, 919, 921 (8th Cir. 2001) (holding no substantive due process  
23 violation where a coach daily called a student "retarded," "stupid," and "dumb" in front of her  
24 classmates); *Abeyta By & Through Martinez v. Chama Valley Indep. Sch. Dist., No. 19*, 77 F.3d  
25 1253, 1256-58 (10th Cir. 1996) (holding no substantive due process violation where a teacher  
26 called a twelve-year-old student a prostitute over a period of a month and a half). I therefore  
27 dismiss the § 1983 substantive due process claim against Wing.  
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1                   2. *Defendant Donadio*

2           Donadio likewise argues she is not alleged to have engaged in any inappropriate sexual  
3 conduct with John and the few comments she allegedly made do not rise to the level of a due  
4 process violation. Alternatively, she asserts she is entitled to qualified immunity.

5           The Does respond that Donadio was aware of the Teacher's behavior toward male  
6 students, and the administration knew about the Teacher's relationship with John prior to the  
7 incident that caused the Teacher's arrest. The Does argue Donadio thus is liable because she  
8 knew there was a possibility that the Teacher was abusing John but she did nothing to investigate  
9 or stop the Teacher's conduct. They contend that this failure to act amounts to deliberate  
10 indifference. The Does also argue Donadio was deliberately indifferent when she allowed the  
11 District Police to remove John from class and interrogate him. The Does contend that if they  
12 have adequately alleged Donadio was deliberately indifferent, then she is not entitled to qualified  
13 immunity. Finally, the Does argue that Donadio's comment about John being mentally unstable  
14 supports a Fourteenth Amendment violation under § 1983.

15           There is no respondeat superior liability under § 1983. *Preschooler II v. Clark Cnty. Sch.*  
16 *Bd. of Trustees*, 479 F.3d 1175, 1182 (9th Cir. 2007). However, a supervisor may be liable under  
17 § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation,  
18 or (2) a sufficient causal connection between the supervisor's wrongful conduct and the  
19 constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir. 2011) (quotation  
20 omitted). Thus, a supervisor "can be liable in his individual capacity for his own culpable action  
21 or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the  
22 constitutional deprivation; or for conduct that showed a reckless or callous indifference to the  
23 rights of others." *Id.* at 1208 (quotation omitted).

24           Except for Donadio's comment about John's mental instability, the Does' arguments do  
25 not match the amended complaint's allegations. The amended complaint does not allege Donadio  
26 was aware of the Teacher's behavior towards male students generally or with respect to John in  
27 particular. Rather, the amended complaint alleges, in conclusory fashion, that the Teacher's  
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1 inappropriate behavior and her conduct with John were known to “fellow Foothill High School  
2 and Clark County School District administration.” ECF No. 7 at 4. There is no allegation that  
3 Donadio was among those in the “administration” who were aware of this information nor are  
4 there any factual allegations about what Donadio and others knew about the Teacher’s history or  
5 reputation generally, or how the administration was aware of her conduct with John.

6 The amended complaint also does not contain factual allegations that Donadio knew there  
7 was a possibility that the Teacher was abusing John. The only allegation is that the  
8 “administration” was aware of John’s absences from his sixth period class. There are no factual  
9 allegations that Donadio knew about these absences, that she knew that John was spending that  
10 time with the Teacher, or that she had any reason to suspect possible sexual misconduct. There  
11 are no allegations, for example, that anyone complained to Donadio about the Teacher’s conduct  
12 generally, or in particular with respect to John.

13 The amended complaint also does not support the Does’ argument that Donadio “allowed”  
14 District Police to remove John from class and interrogate him. There are no factual allegations  
15 that Donadio even knew that John was removed from class and questioned, much less that she  
16 had any role in the matter or any authority to direct the District Police’s conduct.

17 “The absence of specifics is significant because, to establish individual liability under 42  
18 U.S.C. § 1983, a plaintiff must plead that each Government-official defendant, through the  
19 official’s own individual actions, has violated the Constitution.” *Hydrick v. Hunter*, 669 F.3d 937,  
20 942 (9th Cir. 2012) (quotation omitted). “Even under a deliberate indifference theory of  
21 individual liability, the Plaintiffs must still allege sufficient facts to plausibly establish the  
22 defendant’s knowledge of and acquiescence in the unconstitutional conduct of his subordinates.”  
23 *Id.* (quotation omitted). The Does have failed to adequately allege facts to establish Donadio’s  
24 liability for deliberate indifference.

25 Finally, as discussed above with respect to Wing, Donadio’s isolated comment that John  
26 might have misunderstood Wing’s comments because he had an “unstable mindset” does not  
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1 suffice to state a substantive due process claim. I therefore dismiss the § 1983 claim against  
2 Donadio.

3 *3. Defendant District*

4 The District argues the amended complaint does not adequately allege what sexual  
5 conduct took place between John and the Teacher, and thus the complaint does not plausibly  
6 allege a substantive due process violation. The District also argues it cannot be liable under a  
7 respondeat superior theory for the Teacher's misconduct and there are no factual allegations that  
8 the District was on notice that the Teacher was sexually abusing students. Finally, the District  
9 argues that reference to John's 504 plan cannot support a § 1983 claim because any violations  
10 must be addressed under the Rehabilitation Act.

11 The Does respond that the District violated John's substantive due process rights to be  
12 free from sexual abuse by a teacher while attending public school. The Does contend they need  
13 allege only that there was sexual abuse because that conduct necessarily shocks the conscience.  
14 The Does assert they need not plead factual allegations of exactly what constitutes sexual conduct  
15 because that is defined by the statute under which the Teacher pleaded guilty. The Does contend  
16 the District is liable as an entity because it had a deliberately indifferent policy of failing to  
17 adequately train and supervise its teachers to prevent sexual misconduct with students. The Does  
18 also argue the District Police's conduct of removing John from his class, interrogating him, and  
19 doing so in a manner that did not protect John's privacy shocks the conscience. Finally, the Does  
20 argue in a footnote that the interrogation was a seizure that violated John's Fourth Amendment  
21 rights. ECF No. 22 at 14-15, n.3.

22 Like supervisors, entities are not liable under § 1983 based on a respondeat superior  
23 theory for the acts of their employees. *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1185 (9th  
24 Cir. 2002). Instead, a plaintiff has three means of holding liable a governmental entity like the  
25 District. "First, a local government may be held liable when implementation of its official  
26 policies or established customs inflicts the constitutional injury." *Clouthier v. Cnty. of Contra*  
27 *Costa*, 591 F.3d 1232, 1249 (9th Cir. 2010) (quotation omitted). "Second, under certain  
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1 circumstances, a local government may be held liable under § 1983 for acts of omission, when  
2 such omissions amount to the local government's own official policy." *Id.* (quotation omitted).  
3 This could include the failure to adequately train its employees, but a failure to train "must  
4 amount to deliberate indifference to a constitutional right." *Id.* Finally, "a local government may  
5 be held liable under § 1983 when the individual who committed the constitutional tort was an  
6 official with final policy-making authority or such an official ratified a subordinate's  
7 unconstitutional decision or action and the basis for it." *Id.* at 1250 (quotation omitted).

8 *a. Sexual Abuse*

9 The Does have not adequately alleged a constitutional injury based on the conclusory  
10 allegation that the Teacher lured John to engage in "sexual conduct." John had a constitutional  
11 right to be free from sexual abuse by the Teacher. *Plumeau*, 130 F.3d at 438. However, the  
12 amended complaint does not adequately allege John was sexually abused. Instead, the amended  
13 complaint alleges the Teacher lured John into undefined "sexual conduct." ECF No. 7 at 3. The  
14 amended complaint also alleges the Teacher pleaded guilty to luring John with the intent of  
15 engaging in sexual conduct. *Id.* But the amended complaint does not allege that the two actually  
16 engaged in sexual conduct or what that conduct was. Absent factual allegations about what  
17 transpired between the Teacher and John, the amended complaint does not plausibly allege a  
18 substantive due process violation. *See Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 726 (6th  
19 Cir. 1996) (holding that a single instance of a coach rubbing a student's stomach along with a  
20 suggestive comment was insufficient to state a substantive due process claim).

21 Additionally, there are insufficient factual allegations that would support the District's  
22 liability. The District cannot be liable on a respondeat superior theory for the Teacher's  
23 misconduct. Instead, the amended complaint must set forth factual allegations showing a  
24 plausible entitlement to relief against the District for its own actions or inactions. The Does rest  
25 on the theory that the District failed to adequately train and supervise its employees. But the  
26 amended complaint states in only conclusory fashion that the District knew of the Teacher's prior  
27 reputation or history and that it knew about her conduct with John. There are no factual  
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1 allegations to support either of these conclusory statements. The only factual allegation is that the  
2 administration knew John was missing his sixth period class. There is no allegation that the  
3 District knew that John was spending that time with the Teacher, much less that it knew or should  
4 have known what was happening between them. There are no factual allegations that the Teacher  
5 engaged in any inappropriate conduct on school premises during these sixth period visits with  
6 John. There are no allegations that anyone had complained to the District about the Teacher's  
7 conduct with John or with any other students. Additionally, by the amended complaint's  
8 allegations, as soon as the District Police learned of the incident, immediate action was taken to  
9 investigate the incident, and the Teacher was terminated and criminally prosecuted. The Does  
10 therefore have not adequately alleged that the District was deliberately indifferent to the alleged  
11 sexual abuse perpetrated by the Teacher. Consequently, I dismiss the Does' § 1983 substantive  
12 due process claim against the District based on the District's alleged failure to prevent or respond  
13 to the Teacher sexually abusing John.

14 *b. Interrogation*

15 The right to privacy "is implicitly guaranteed by the Constitution as one aspect of the  
16 liberty protected by the Due Process clause of the fourteenth amendment." *Fugate v. Phoenix*  
17 *Civil Serv. Bd.*, 791 F.2d 736, 738 (9th Cir. 1986) (internal quotation marks omitted). "The  
18 constitution protects two kinds of privacy interests." *Thorne v. City of El Segundo*, 726 F.2d 459,  
19 468 (9th Cir. 1983). "One is the individual interest in avoiding disclosure of personal matters,  
20 and another is the interest in independence in making certain kinds of important decisions."  
21 *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Determining whether the government has violated  
22 privacy rights involves a balancing test: "[t]he more fundamental the rights on which the state's  
23 activities encroach, the more weighty must be the state's interest in pursuing that course of  
24 conduct." *Thorne*, 726 F.2d at 469. The factors bearing on the issue are: (1) whether the  
25 governmental conduct was justified by the legitimate governmental interests, (2) whether the  
26 governmental conduct was narrowly tailored to meet those legitimate interests, and (3) whether  
27 the government's use of the information it obtained was proper in light of those interests. *Id.*  
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1 Information about sexual activity falls within the constitutionally protected right of  
2 privacy. *Id.* at 468; *see also Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (holding that  
3 publically revealing information regarding sexual activity “exposes an aspect of our lives that we  
4 regard as highly personal and private” and “information regarding private sexual matters warrants  
5 constitutional protection against public dissemination”). Consequently, the unjustified public  
6 disclosure of a person’s sexual activities may violate substantive due process. *Block*, 156 F.3d at  
7 686 (holding law enforcement had no justification for disseminating the details of a rape at a  
8 press conference because the release of the details was not “necessary to apprehend a suspect or  
9 for any specific law enforcement purpose”); *see also Thorne*, 726 F.2d at 470-71 (holding police  
10 department was not justified in conditioning employment on questioning about private sexual  
11 conduct and could not reject applicant based on off-duty personal sexual activities absent a  
12 showing it would impact on-the-job performance).

13 Here, the questioning of John was justified by legitimate governmental interests. The  
14 District Police became aware of a possible improper relationship between a teacher and a student.  
15 Given the potential severity of the situation, the District was justified in questioning John for an  
16 hour and a half and telling him that if he did not tell them everything then they would have to  
17 question others.

18 However, the governmental conduct must also be narrowly tailored to meet its legitimate  
19 interests. Taking the amended complaint’s allegations as true, the District Police did not take  
20 steps to insulate others from later identifying John even though they knew they would be  
21 questioning a minor about an alleged sexual relationship with a teacher and they must have  
22 known that if the charge was substantiated, public criminal charges likely would result. A  
23 reasonable jury could find that removing John from class and questioning him about such a  
24 sensitive topic in public view with a door to the office open, combined with the real possibility  
25 that doing so would result in revealing John’s identity as the victim of a sex crime, violated  
26 John’s substantive due process rights. Additionally, the amended complaint alleges that the  
27 District had a policy, custom, and practice of intentionally leaving the interrogation room door  
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1 open and with deliberate indifference to not protecting students' privacy. Thus, the amended  
 2 complaint has alleged a basis for the District's liability beyond respondeat superior. I deny the  
 3 defendants' motion to dismiss this portion of the § 1983 claim.

4 *c. Fourth Amendment*

5 The Does argue that the interrogation of John could be analyzed as a seizure in violation  
 6 of his Fourth Amendment rights. ECF No. 22 at 14-15, n.3. "[I]f a constitutional claim is covered  
 7 by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must  
 8 be analyzed under the standard appropriate to that specific provision, not under the rubric of  
 9 substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). Consequently, a  
 10 substantive due process analysis is not appropriate if the Does' § 1983 claim is covered by the  
 11 Fourth Amendment. *Cnty. of Sacramento*, 523 U.S. at 843.

12 However, the Fourth Amendment does not cover the privacy interest in avoiding public  
 13 disclosure of intimate sexual information that is governed by the substantive due process clause.  
 14 Consequently, the allegations that the District Police revealed private information about John by  
 15 removing him from class and questioning him in public view are properly analyzed under the  
 16 substantive due process clause, as set forth above, rather than as a Fourth Amendment claim.<sup>2</sup>

17 *d. The 504 Plan*

18 The defendants argue that the alleged violation of the Rehabilitation Act cannot support a  
 19 § 1983 claim. The Does do not respond to this argument. I therefore grant this aspect of the  
 20 defendants' motion as unopposed. LR 7-2(d); *see also Vinson v. Thomas*, 288 F.3d 1145, 1156  
 21 (9th Cir. 2002) (holding that a plaintiff cannot bring a § 1983 "to vindicate rights created by Title  
 22 II of the ADA or section 504 of the Rehabilitation Act" because those acts provide  
 23 comprehensive remedial schemes).

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 27 <sup>2</sup> In their opposition, the Does did not conduct a Fourth Amendment analysis or explain how  
 28 John's interaction with the District Police would violate the Fourth Amendment other than the public  
 disclosure of private information. *See* ECF No. 22 at 14 n.3.

1           **C. Title IX Claim Against the District**

2           The Does allege the District, through Donadio, failed to stop Foothill teachers from  
3 harassing John and failed to implement John's 504 plan. ECF No. 7 at 10.<sup>3</sup> The defendants argue  
4 that while Title IX covers a teacher's sexual abuse of a student, the complaint must allege school  
5 officials who were empowered to correct the problem knew of and failed to respond to the  
6 inappropriate conduct. The District argues that the only allegation going to knowledge is that  
7 John missed his sixth grade class. The District argues that the fact that John's absences were  
8 noted does not amount to notice that John and the Teacher had an improper relationship.

9           The Does respond by arguing that the District had actual knowledge that the Teacher  
10 potentially was abusing John because it knew of the Teacher's reputation, it was aware of the  
11 Teacher's flirtatious behavior towards John, and it failed to act when it learned John was missing  
12 his sixth period class. They thus contend the District was deliberately indifferent to the Teacher's  
13 sexual conduct towards John.

14           Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from  
15 participation in, be denied the benefits of, or be subjected to discrimination under any education  
16 program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681. To state a Title  
17 IX claim, a plaintiff must allege that a school official with the authority to institute corrective  
18 measures on the school district's behalf had actual notice of the alleged discrimination and  
19 responded or failed to respond to that knowledge with deliberate indifference. *Gebser v. Lago*  
20 *Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

21           The amended complaint does not adequately allege facts showing that a school official  
22 with authority to institute corrective measures had actual notice that John was being sexually  
23 abused by the Teacher. There are no factual allegations of actual notice. The allegations are only  
24 conclusory statements that the District and unidentified people in the administration knew of the  
25 Teacher's reputation and that they knew about her conduct with John. But there are no factual

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27           <sup>3</sup> The defendants move to dismiss this claim as to Donadio because they argue Title IX does not  
28 apply to individual defendants. The Does indicate in their response that this claim is being asserted only  
against the District. ECF No. 22 at 5.

1 allegations about which school officials knew or what they knew. The only factual allegation is  
2 that unidentified administration personnel knew John was missing his sixth period class. This  
3 fact does not plausibly allege actual notice that the Teacher was engaged in inappropriate conduct  
4 with John. There are no factual allegations that anyone knew John was spending sixth period  
5 with the Teacher, that anyone knew what they were doing (or that they engaged in sexual conduct  
6 on school grounds during sixth period), or that anyone complained about the Teacher's behavior,  
7 either generally or particularly with respect to John. I therefore grant the defendants' motion to  
8 dismiss this claim.

9 **D. Americans with Disabilities Act/Rehabilitation Act Claim Against the District**

10 The Does allege John has a disability involving anxiety but the District and Donadio were  
11 deliberately indifferent to the implementation of his 504 plan and failed to follow the District's  
12 own policies and procedures which required an annual team meeting to make sure the plan was  
13 being followed. ECF No. 7 at 10. The defendants argue that this claim must be addressed under  
14 the Rehabilitation Act, not the Americans with Disabilities Act. They also argue the Does failed  
15 to exhaust their administrative remedies and there are no facts alleged that would support the  
16 conclusion that resort to administrative remedies would have been futile. The defendants also  
17 argue the complaint does not set forth factual allegations regarding how they failed to implement  
18 John's 504 plan.

19 The Does respond that they need not exhaust administrative remedies when they seek  
20 monetary relief as opposed to injunctive relief. They assert they have adequately alleged John  
21 has a disability and that he was eligible to receive, and did receive, a Section 504 plan. They also  
22 assert they adequately allege the District denied John the benefit of his plan when it failed to  
23 prevent the Teacher from sexually abusing John. They argue they have adequately alleged the  
24 District failed to implement that plan and failed to provide an effective annual team meeting.  
25 Finally, they contend they have adequately alleged the District discriminated against John based  
26 on his disability because the District was aware of John's disability, his disability made him more  
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1 susceptible to the Teacher's conduct, and Donadio commented on John's disability when she  
2 mentioned his "unstable mindset."

3       Regardless of whether this claim is based on the Americans with Disabilities Act, the  
4 Rehabilitation Act, or both, plaintiffs "must exhaust administrative remedies before filing a civil  
5 lawsuit if they seek relief for injuries that could be redressed to any degree by the [Individuals  
6 with Disabilities Education Act's ("IDEA")<sup>4</sup>] administrative procedures." *Kutasi v. Las Virgenes*  
7 *Sch. Dist.*, 494 F.3d 1162, 1163 (9th Cir. 2007); *see also id.* at 1167 (stating "the IDEA requires  
8 that before plaintiffs may file a civil action under the Constitution, the Americans with  
9 Disabilities Act, title V of the Rehabilitation Act or other Federal laws protecting the rights of  
10 children with disabilities, they must exhaust the IDEA's due process hearing procedure if the  
11 action 'seek[s] relief that is also available under' the IDEA. 20 U.S.C. § 1415(l)"). However,  
12 exhaustion is not required if the plaintiff "seeks a remedy for an injury that could not be redressed  
13 by the IDEA's administrative procedures." *Id.* at 1168.

14       To determine whether exhaustion is required, I begin "by looking at a complaint's prayer  
15 for relief and determine whether the relief sought is also available under the IDEA." *Payne v.*  
16 *Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011) (en banc), *overruled on other grounds by*  
17 *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). Exhaustion is "clearly required when a plaintiff  
18 seeks an IDEA remedy or its functional equivalent." *Id.* A specific example of when exhaustion  
19 is required is when relief is requested in the form of "damages for the costs of a private school  
20 education." *Id.* Additionally, exhaustion is required "where a plaintiff is seeking to enforce rights  
21 that arise as a result of a denial of a free appropriate public education ["FAPE"], whether pled as  
22 an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the  
23 cause of action (for instance, a claim for damages under § 504 of the Rehabilitation Act of 1973,  
24 29 U.S.C. § 794, premised on a denial of a FAPE)." *Id.*

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27       <sup>4</sup> "The IDEA is a comprehensive educational scheme that confers on students with disabilities a  
28 substantive right to public education." *Kutaski*, 494 F.3d at 1166.



1 Exhaustion is not required if resort to the administrative process would be “futile or  
2 inadequate.” *Kutasi*, 494 F.3d at 1168. The party claiming that exhaustion would be futile or  
3 inadequate bears the burden of proving futility or inadequacy. *Id.* An example of futility is where  
4 the plaintiff seeks only monetary damages and the educational issues have already been resolved  
5 through an administrative process. *Id.* Additionally, if the plaintiff states “a plausible claim for  
6 damages unrelated to the deprivation of a FAPE, the IDEA does not require her to exhaust  
7 administrative remedies before seeking them in court.” *Payne*, 653 F.3d at 877.

8 However, “a plaintiff cannot evade the IDEA’s exhaustion requirement merely by limiting  
9 a claim to money damages.” *Kutasi*, 494 F.3d at 1168-69. “If the measure of a plaintiff’s  
10 damages is the cost of counseling, tutoring, or private schooling—relief available under the  
11 IDEA—then the IDEA requires exhaustion.” *Payne*, 653 F.3d at 877. Likewise, if “the claim  
12 arises only as a result of a denial of a FAPE, whether under the IDEA or the Rehabilitation Act,  
13 exhaustion is clearly required no matter how the claim is pled.” *Id.* at 880. For example, if the  
14 claimed emotional distress damages arise from concerns that the student “was not receiving an  
15 adequate education, then exhaustion is required.” *Id.* at 883. Additionally, “[r]elief that is also  
16 available under the IDEA does not necessarily mean relief that fully satisfies the aggrieved party.  
17 Rather, it means relief suitable to remedy the wrong done the plaintiff, which may not always be  
18 relief in the precise form the plaintiff prefers.” *Kutasi*, 494 F.3d at 1169.

19 Here, the amended complaint’s prayer for relief requests, without differentiation for the  
20 various claims: (1) emotional distress damages for John; (2) medical expenses for John; (3)  
21 tuition expenses for John; and (4) medical costs for Parent Doe. ECF No. 7 at 12. The request for  
22 tuition costs clearly requires exhaustion and the Does do not contest that they have not exhausted  
23 their administrative remedies as to that request. I therefore dismiss the request for tuition costs as  
24 it relates to this claim for failure to exhaust.

25 It is unclear from the amended complaint whether the requests for emotional distress  
26 damages and medical costs require exhaustion because the amended complaint asserts the alleged  
27 violations supporting this claim in conclusory fashion. The amended complaint states that the  
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1 defendants failed to implement the 504 plan, without giving factual allegations as to what actions  
2 or omissions took place. The only factual allegation related to this claim is that the District failed  
3 to hold “an effective and thorough ‘team meeting’ at least annually to accommodate John Doe  
4 and to make sure the 504 plan is being followed.” *Id.* at 10. However, to the extent the emotional  
5 distress and medical costs arise from the failure to implement the plan, thus creating damages  
6 from the loss of a FAPE, that would require exhaustion. Because there are no other factual  
7 allegations supporting this claim, I dismiss it for failure to exhaust and for failure to plausibly  
8 allege an entitlement to relief.

9 **E. Negligence Claim Against the District**

10 The Does allege the District negligently hired, trained, and supervised the Teacher. ECF  
11 No. 7 at 10-11. The defendants argue the District is entitled to discretionary immunity for this  
12 claim. The Does respond that discretionary immunity does not apply where the defendant acted  
13 in bad faith. They contend they have alleged bad faith based on the way John was removed from  
14 class and interrogated, as well as Wing and Donadio’s statements.

15 Nevada Revised Statutes (“NRS”) § 41.032 sets forth exceptions to Nevada’s general  
16 waiver of sovereign immunity. Pursuant to § 41.032(2), no action may be brought against a state  
17 officer or employee or any state agency or political subdivision that is “[b]ased upon the exercise  
18 or performance or the failure to exercise or perform a discretionary function or duty on the part of  
19 the state or any of its agencies or political subdivisions or of any officer, employee or immune  
20 contractor of any of these, whether or not the discretion involved is abused.” Nevada looks to  
21 federal law addressing the Federal Tort Claims Act for guidance on what type of conduct  
22 discretionary immunity protects. *Martinez v. Maruszczak*, 168 P.3d 720, 727-28 (Nev. 2007) (en  
23 banc). Federal courts have held that “decisions relating to the hiring, training, and supervision of  
24 employees usually involve policy judgments of the type Congress intended the discretionary  
25 function exception to shield.” *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (citing  
26 cases). However, acts taken in bad faith are not protected by discretionary immunity under  
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1 Nevada law. *See Falline v. GNLV Corp.*, 823 P.2d 888, 891 (Nev. 1991); *see also Davis v. City of*  
2 *Las Vegas*, 478 F.3d 1048, 1059-60 (9th Cir. 2007).

3 The Does do not dispute that the District is entitled to discretionary immunity for this type  
4 of claim. Instead, they argue that an exception applies because they have alleged the District  
5 acted in bad faith. However, this claim is based on the District negligently hiring, and then  
6 negligently failing to train or supervise the Teacher. There are no factual allegations of bad faith  
7 in relation to that conduct. The Does' allegations about bad faith acts taken after the fact (during  
8 the interrogation, comments later allegedly made to John, or the alleged failure to implement his  
9 504 plan) do not plausibly allege a bad faith hiring of the Teacher or bad faith failure to train or  
10 supervise the Teacher to prevent her from abusing John. I therefore grant the defendants' motion  
11 to dismiss this claim.

12 **F. Intentional Infliction of Emotional Distress Claim Against All Defendants**

13 The Does allege Wing and Donadio's comments and the District Police's actions were  
14 extreme and outrageous and committed with the intention of violating, or in reckless disregard of,  
15 John's rights causing him extreme emotional distress. ECF No. 7 at 11. The defendants argue  
16 Wing and Donadio's comments are not sufficiently extreme to support a claim for intentional  
17 infliction of emotional distress ("IIED"). They also argue the District Police's conduct of  
18 investigating an alleged improper relationship between a student and a teacher cannot support an  
19 IIED claim.

20 The Does respond that whether Wing and Donadio's conduct was extreme and outrageous  
21 should be left to the jury to determine. They argue that where, as here, the defendants knew John  
22 was peculiarly susceptible to emotional distress and where the defendants abused their positions,  
23 those facts may cause a jury to find conduct extreme and outrageous that might not be in other  
24 circumstances. As to the District, the Does argue that the manner of the interrogation was  
25 extreme and outrageous.

26 To establish an IIED claim under Nevada law, the Does must allege: (1) the defendants'  
27 conduct was extreme and outrageous; (2) the defendants either intentionally or recklessly caused  
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1 the emotional distress; (3) John actually suffered severe or extreme emotional distress; and (4) the  
2 defendants' conduct actually or proximately caused his suffering. *Star v. Rabello*, 625 P.2d 90, 92  
3 (Nev. 1981); *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1145 (Nev. 1983). "The Court  
4 determines whether the defendants' conduct may be regarded as extreme and outrageous so as to  
5 permit recovery, but, where reasonable people may differ, the jury determines whether the  
6 conduct was extreme and outrageous enough to result in liability." *Chegade Refai v. Lazaro*, 614  
7 F. Supp. 2d 1103, 1121 (D. Nev. 2009) (citing *Norman v. Gen. Motors Corp.*, 628 F. Supp. 702,  
8 704-05 (D. Nev. 1986) & Restatement (Second) of Torts § 46 cmt. h).

9 "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency  
10 and is regarded as utterly intolerable in a civilized community." *Maduike v. Agency Rent-A-Car*,  
11 953 P.2d 24, 26 (Nev. 1998) (quotation omitted). However, "persons must necessarily be  
12 expected and required to be hardened to occasional acts that are definitely inconsiderate and  
13 unkind." *Id.* (omission and quotation omitted); *see also* Restatement (Second) of Torts § 46 cmt.  
14 d ("The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty  
15 oppressions, or other trivialities.").

16 The Supreme Court of Nevada looks to the Restatement (Second) of Torts § 46 as relevant  
17 authority for IIED claims under Nevada law. *See, e.g., Olivero v. Lowe*, 995 P.2d 1023, 1027  
18 (Nev. 2000); *Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256, 1257 (1980). The Restatement  
19 states that extreme and outrageous conduct may arise "from the actor's knowledge that the other  
20 is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or  
21 peculiarity." Restatement (Second) of Torts § 46 cmt. f. "[H]owever, . . . major outrage is  
22 essential to the tort; and the mere fact that the actor knows that the other will regard the conduct  
23 as insulting, or will have his feelings hurt, is not enough." *Id.* Extreme and outrageous conduct  
24 also "may arise from an abuse by the actor of a position, or a relation with the other, which gives  
25 him actual or apparent authority over the other, or power to affect his interests." *Id.* cmt. e (stating  
26 "school authorities" have been held liable for "extreme abuse of their position").

27 ////  
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1                    *1. Wing*

2                    Wing's comments that she was raped and understood John's anxiety and that John hides  
3 his emotions behind humor are not outrageous. However, reasonable minds could differ about  
4 whether Wing's statement that John cost her friend, the Teacher, a job, was extreme and  
5 outrageous. Wing made this statement while in a position of authority over John as his English  
6 teacher, and she knew him to be susceptible to special harm because she knew about his  
7 relationship with the Teacher and about his anxiety disorder. A reasonable jury could find it  
8 extreme and outrageous that Wing abused her position and blamed a minor with an anxiety  
9 disorder who had been the victim of improper sexual conduct for costing that teacher her job.  
10 Accordingly, I deny the defendants' motion to dismiss this portion of the IIED claim against  
11 Wing.

12                    *2. Donadio*

13                    Reasonable minds also could differ about whether Donadio's comment that John  
14 misunderstood Wing's comments due to his "unstable mindset" is extreme and outrageous. It is  
15 not entirely clear from the amended complaint which of Wing's comments Donadio defended.  
16 See ECF No. 7 at 6. However, a reasonable inference from the allegations is that Donadio  
17 defended all of Wing's comments, including her comment that John cost the Teacher her job.  
18 Donadio made this statement while in a position of authority over John as the school principal,  
19 and based on the content of her statement she knew John to be susceptible to special harm  
20 because of his anxiety disorder. A reasonable jury could find that Donadio's comment attributing  
21 a supposed misunderstanding about Wing's comments to John's mental disorder was extreme and  
22 outrageous. Accordingly, I deny the defendants' motion to dismiss the IIED claim against  
23 Donadio.

24                    *3. The District*

25                    The District Police's acts in conducting an interrogation for over an hour and threatening  
26 to question other students unless John told them about the relationship with the Teacher are not  
27 extreme and outrageous. The District was entitled to conduct an investigation into an alleged  
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1 inappropriate relationship between a teacher and a student. Additionally, advising the student that  
2 the District Police would have to question others if he was not forthcoming is not extreme and  
3 outrageous in the context of an investigation into serious criminal misconduct.

4 However, a reasonable jury could find that the public manner in which the District Police  
5 carried out the interrogation that exposed John's identity as the Teacher's victim was extreme and  
6 outrageous. The District Police were in a position of authority and knew they were dealing with a  
7 minor child who they were going to question about an alleged sexual relationship with a teacher.  
8 A reasonable jury could find the failure to take steps to protect John's identity, and instead  
9 publicly exposing their questioning of John, was extreme and outrageous. I therefore deny the  
10 motion to dismiss the IIED claim against the District.

11 **G. Public Disclosure of Private Facts Claim Against All Defendants**

12 The Does allege the District Police disclosed private facts when they removed John from  
13 class and interrogated him where other students could see, allowing the students to later figure out  
14 that he was the one who had an improper relationship with the Teacher after the Teacher's arrest  
15 was reported on the news. ECF No. 7 at 11. The Does also allege Wing and Donadio's comments  
16 to John violated Nevada's anti-bullying statute, NRS § 388.122 *et seq. Id.* at 11-12.

17 The defendants argue there is no cause of action for bullying and the cited statute does not  
18 provide a private cause of action. As for the public disclosure of private facts, the defendants  
19 argue the complaint does not allege John was taken from his class by the police and they contend  
20 that students going to the administrative office is common. They also argue the police and school  
21 were justified in investigating the improper relationship. Finally, they assert the amended  
22 complaint does not allege they revealed that John was involved in a relationship with the Teacher  
23 and the fact that other people linked John to the Teacher based on seeing him in the office and  
24 then the Teacher being arrested does not constitute public disclosure.

25 The Does respond that the District Police publicized his involvement in the inappropriate  
26 relationship by removing him from class and interrogating him where others could see. The Does  
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1 argue it does not matter that the general public did not learn of it so long as a particular group of  
2 people learned about it and that caused embarrassment.

3 *1. Public Disclosure of Private Facts*

4 “To maintain a cause of action for public disclosure of private facts one must prove that a  
5 public disclosure of private facts has occurred which would be offensive and objectionable to a  
6 reasonable person of ordinary sensibilities.” *State v. Eighth Judicial Dist. Ct. ex rel. Cnty. of*  
7 *Clark*, 42 P.3d 233, 240 (Nev. 2002) (en banc) (quotation omitted); *see also Montesano v. Donrey*  
8 *Media Grp.*, 668 P.2d 1081, 1084 (Nev. 1983) (citing Restatement (Second) of Torts § 652D  
9 (1977)). “Public” disclosure means “that the matter is made public, by communicating it to the  
10 public at large, or to so many persons that the matter must be regarded as substantially certain to  
11 become one of public knowledge.” Restatement (Second) of Torts § 652D cmt. a (1977). The  
12 communication “may be oral, written or by any other means,” but it must be “a communication  
13 that reaches, or is sure to reach, the public.” *Id.* “[I]t is not an invasion of the right of privacy,  
14 within the rule stated in [§ 652D], to communicate a fact concerning the plaintiff’s private life to  
15 a single person or even a small group of persons.” *Id.* But “any publication in a newspaper or a  
16 magazine, even of small circulation, or in a handbill distributed to a large number of persons, or  
17 any broadcast over the radio, or statement made in an address to a large audience, is sufficient to  
18 give publicity within the meaning of the term as it is used in this Section.” *Id.* “The distinction, in  
19 other words, is one between private and public communication.” *Id.*; *see also Kuhn v. Account*  
20 *Control Tech., Inc.*, 865 F. Supp. 1443, 1448 (D. Nev. 1994) (holding that communications  
21 “limited to the small group of [the plaintiff’s] co-workers . . . was not made ‘public’ as that term  
22 is used in the Restatement”).

23 The amended complaint does not allege the defendants made “public” communications  
24 within the meaning of this tort. The defendants allegedly failed to take steps to prevent a small  
25 group of persons from observing John being removed from class and then questioned in the  
26 administrative office. That does not amount to communicating it to the public at large, or to so  
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1 many persons that the matter must be regarded as substantially certain to become one of public  
2 knowledge. I therefore grant this portion of the defendants' motion to dismiss.

3 *2. Bullying*

4 The Does did not respond to the defendants' arguments about the bullying allegations. I  
5 therefore grant this portion of the defendants' motion as unopposed. LR 7-2(d).

6 **H. Violation of Vulnerable Persons Statute Against All Defendants**

7 The Does allege that John was a vulnerable person as defined by NRS § 41.1395, that the  
8 defendants intentional or recklessly caused him extreme emotional distress, and that John  
9 therefore is entitled to attorney's fees, costs, and double damages. ECF No. 7 at 12. The  
10 defendants argue this statute does not provide a claim for relief. Rather, they contend, it provides  
11 for double damages if its conditions are met. They also argue this statute does not apply to the  
12 District because it is not a "person" under the statute's meaning. Finally, they assert that neither  
13 Donadio nor Wing caused John Doe to suffer personal injuries or engaged in "abuse" as defined  
14 by the statute.

15 The Does respond that John is a vulnerable person because he suffered from emotional  
16 disorders. They also argue the District is a person under the statute because the District is a  
17 political subdivision and the statute defines a person to include political subdivisions.

18 NRS § 41.1395(1) provides that if a "vulnerable person suffers a personal injury or death  
19 that is caused by abuse or neglect or suffers a loss of money or property caused by exploitation,  
20 the person who caused the injury, death or loss is liable to the . . . vulnerable person for two times  
21 the actual damages incurred by the . . . vulnerable person." Abuse means "willful and unjustified  
22 . . . [i]nfliction of pain, injury or mental anguish . . . ." NRS § 41.1395(4)(a)(1).

23 This statute does not create an independent claim. Rather it is a means to recover special  
24 damages under certain circumstances. *Findlay Mgmt. Grp. v. Jenkins*, No. 60920, 2015 WL  
25 5728870, at \*2 (Nev. Sept. 28, 2015) (describing this statute as one for special damages that must  
26 be specifically pleaded under Nevada law); *Phipps v. Clark Cty. Sch. Dist.*, --- F. Supp. 3d. ---,  
27 No. 2:13-CV-0002-GMN-PAL, 2016 WL 730728, at \*7 (D. Nev. Feb. 22, 2016) (referring to this  
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1 section as providing “enhanced damages”). Special damages must be pleaded. Fed. R. Civ. P.  
2 9(g). Because the plaintiffs’ IIED claim against Wing and Donadio survives dismissal, special  
3 damages may be available if a jury finds Wing and Donadio willfully and without justification  
4 inflicted emotional distress. I therefore will not dismiss the special damages allegations against  
5 Wing and Donadio.

6 However, the District is not a “person” as the term is used in the statute. *See Simonian v.*  
7 *Univ. & Cmty. Coll. Sys. of Nev.*, 128 P.3d 1057, 1060 (Nev. 2006) (stating that “unless a statute  
8 expressly indicates otherwise, we will presume that the statute does not confer ‘person’ status on  
9 a state entity”); Nev. Rev. Stat. § 0.039 (stating that unless a particular statute provides otherwise,  
10 the term “person . . . does not include a government, governmental agency or political subdivision  
11 of a government”); *see also Phipps*, 2016 WL 730728, at \*7. The Does’ reliance on NRS  
12 § 41.031 is misplaced. That statute does not define “person” to include political subdivisions of  
13 the state. Instead, it is a waiver of sovereign immunity. I therefore dismiss the special damages  
14 request against the District.

### 15 **I. Negligent Infliction of Emotional Distress Claim Against All Defendants**

16 The Does allege that Parent Doe, John’s father, was at the scene of John’s attempted  
17 suicide, and he suffered emotional distress from observing the suicide attempt. ECF No. 7 at 12.  
18 The defendants argue that John’s suicide is an intervening act that cuts off any negligence of the  
19 defendants. Alternatively, the defendants argue that Parent Doe did not observe the defendants’  
20 acts that purportedly caused John to attempt suicide. They thus contend Parent Doe cannot  
21 recover on a bystander theory because he did not observe the defendants’ alleged negligent acts.

22 The Does argue that under Nevada law, Parent Doe need not have witnessed the  
23 defendants’ allegedly negligent acts so long as he perceived the infliction of injury on his son.  
24 The Does also argue that suicide is not necessarily an intervening act that cuts off the defendants’  
25 liability if their conduct brought about delirium or insanity in John that led him to attempt suicide.

26 Nevada has not yet addressed whether suicide is an intervening act that breaks the chain of  
27 causation between a defendant’s conduct and the plaintiff’s injuries. However, the Does appear  
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1 to agree that suicide generally is a superseding act unless the rule in the Restatement (Second) of  
2 Torts § 455 (1967) applies. *See* ECF No. 36 at 41-42. Under § 455,

3 If the actor's negligent conduct so brings about the delirium or insanity of another  
4 as to make the actor liable for it, the actor is also liable for harm done by the other  
to himself while delirious or insane, if his delirium or insanity

5 (a) prevents him from realizing the nature of his act and the certainty or  
risk of harm involved therein, or

6 (b) makes it impossible for him to resist an impulse caused by his insanity  
7 which deprives him of his capacity to govern his conduct in accordance with  
reason.

8 The Does have not alleged facts in the amended complaint that John was so delirious or insane  
9 that he did not understand what he was doing or that he suffered from an irresistible impulse to  
10 harm himself. I therefore grant the defendants' motion to dismiss this claim.

### 11 **III. PLEADING ANONYMOUSLY**

12 The defendants separately move to dismiss because the Does filed suit anonymously  
13 without the court's permission. They also argue there is no basis for the Does to proceed  
14 anonymously because the amended complaint alleges the defendants publicly disclosed John as  
15 the student having a relationship with the Teacher.

16 The Does respond and move for permission to proceed anonymously, arguing that John  
17 was a minor at the time of the relevant facts and he would be exposed to harassment, injury,  
18 ridicule, or personal embarrassment. The Does attach a declaration from John's treating  
19 psychiatrist, Dr. Roitman, to support their claim that anonymity is required to prevent further  
20 stigma and damage to John. They also argue Parent Doe must proceed anonymously because  
21 they share the same last name and revealing his identity would effectively reveal John's as well.  
22 Finally, they contend that their public disclosure of private facts claim does not waive their  
23 request to proceed anonymously. They assert that the amended complaint alleges some students  
24 and faculty were able to figure out it was John that was involved with the Teacher, but that does  
25 not support revealing John's private facts to the world at large.

26 "The normal presumption in litigation is that parties must use their real names." *Doe v.*  
27 *Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1042 (9th Cir. 2010).

1 However, parties may proceed anonymously under certain circumstances. *Does I thru XXIII v.*  
2 *Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000). For example, Federal Rule of Civil  
3 Procedure 5.2(a) requires that filings containing the name of a minor may include only the  
4 minor's initials. Additionally, a party may proceed anonymously "in the unusual case when  
5 nondisclosure of the party's identity is necessary . . . to protect a person from harassment, injury,  
6 ridicule or personal embarrassment." *Advanced Textile Corp.*, 214 F.3d at 1067-68 (quotation  
7 omitted). A court may allow the use of pseudonyms "when the party's need for anonymity  
8 outweighs prejudice to the opposing party and the public's interest in knowing the party's  
9 identity." *Id.* at 1068. Whether to allow a party to proceed anonymously lies within my  
10 discretion. *Id.* at 1069.

11 I deny the defendants' motion to dismiss and grant the Does' motion to proceed  
12 anonymously. John was a minor when this case was filed, so under Rule 5.2(a) it was proper not  
13 to refer to him by name. John is now over 18 years old. *See* ECF No. 7 at 3. However, the  
14 Teacher's misconduct took place while John was still a minor. Revelation of his identity may  
15 cause personal embarrassment, subject him to harassment, and compound the damage done to  
16 him while he was a minor. Although the amended complaint alleges that some people were able  
17 to figure out his identity, that does not mean the public at large knows it. Additionally, the  
18 amended complaint reveals information about John's mental health, including that he has an  
19 anxiety disorder and that he attempted suicide. John's treating psychiatrist opines that revealing  
20 such private information "will exacerbate [John's] anxiety disorder." ECF No. 20 at 14. Because  
21 Parent Doe and John share a last name, revealing Parent's name would effectively identify John.

22 The Does' interests outweigh the District's and the public's interests. The District knows  
23 who John is and is in no way hindered in obtaining discovery or defending its position. At this  
24 stage of the proceedings, the public has little interest in knowing John's identity and it has an  
25 interest in not discouraging litigants like John from attempting to vindicate their rights. There  
26 may come a point in this litigation where this balance of interests will change and John no longer  
27 will be able to proceed anonymously, such as at a public trial of the claims in this case. But at  
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1 this stage of the proceedings, his interests in avoiding injury, harassment, and embarrassment  
2 outweigh the District's and the public's interests in disclosure. I therefore exercise my discretion  
3 to allow the Does to proceed anonymously.

#### 4 **IV. MOTION TO AMEND**

5 The Does have moved under seal to amend their amended complaint to add allegations  
6 about the sexual content of text messages sent by the Teacher to John Doe. ECF No. 35. The  
7 defendants object to the filing of this motion under seal without leave from the court and they  
8 contend the plaintiffs should have publicly filed a redacted version rather than attempt to seal the  
9 entire document. The defendants further assert that the plaintiffs had the text messages since  
10 before this lawsuit was filed and thus could and should have included those allegations in the  
11 original complaint. They also argue that the proposed amended complaint should be rejected  
12 because now that John is no longer a minor, all of his claims must be brought in his own capacity  
13 and not by Parent Doe on John's behalf. Finally, they oppose amendment as futile, arguing that  
14 the text messages do not allege any actual physical conduct between the Teacher and John and the  
15 defendants contend verbal abuse does not suffice to support a substantive due process claim.

16 In their reply, also filed under seal, the Does assert that they could allege additional details  
17 of actual physical contact between the Teacher and John but that they should not have to put such  
18 details in the complaint. Alternatively, they request leave to do so if their current pleadings and  
19 proposed pleadings are insufficient. The defendants move to strike new material and arguments  
20 raised in the reply brief. Alternatively, they move for leave to file a sur-reply. I grant the motion  
21 for leave to file a sur-reply.

22 A "district court should grant leave to amend even if no request to amend the pleading  
23 was made, unless it determines that the pleading could not possibly be cured by the allegation of  
24 other facts." *Henry A. v. Willden*, 678 F.3d 991, 1005 (9th Cir. 2012) (quotation omitted). It is  
25 possible that the amended complaint's deficiencies could be cured through additional factual  
26 allegations. I therefore grant the Does leave to file a second amended complaint that cures the  
27 deficiencies outlined in this order, if they can do so. The Does may include in the amended  
28

pleading the factual allegations referenced in the motion to amend and related reply. The Does must allege sufficient non-conclusory factual allegations about the physical and verbal interaction between John and the Teacher to plausibly state a substantive due process claim. Additionally, because John is no longer a minor, his claims must be brought in his own capacity and not through his father on his behalf.

**V. CONCLUSION**

IT IS THEREFORE ORDERED that the defendants' motion to dismiss (**ECF No. 15**) is **GRANTED in part and DENIED in part** as more fully set forth in this order.

IT IS FURTHER ORDERED that the defendants' motion to dismiss (**ECF No. 16**) is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs' motion to proceed anonymously (**ECF No. 21**) is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiffs' motion to amend (**ECF No. 35**) is **GRANTED in part**. On or before September 12, 2016, the plaintiffs must file a renewed motion to amend with a proposed second amended complaint that corrects the deficiencies identified in this order, if they can do so.

IT IS FURTHER ORDERED that the defendants' motion to strike or to file a sur-reply (**ECF No. 41**) is **GRANTED in part and DENIED in part**. The motion to strike is denied. The motion to file a sur-reply is granted.

IT IS FURTHER ORDERED that the defendants' motion for a hearing (**ECF No. 72**) is **DENIED** as moot.

DATED this 18<sup>th</sup> day of August, 2016.

  
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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE